HJ YUSOFF HJ ABDULLAH A

v.

AFFIN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR B
TENGKU MAIMUN J
[SUIT NO: S4-22-1858-2003]
28 MAY 2009

TORT: *Malicious prosecution - Bankruptcy petition - Plaintiff a director* C
of company - Defendant initiated bankruptcy proceeding against company - Adjudication Order and Receiving Order ('AORO') granted to defendant - Plaintiff succeeded in application for annulment of AORO - Plaintiff claimed malicious prosecution - Defendant negligent in maintaining account of company - Writ of seizure and sale issued against D
plaintiff was not carried out - Whether plaintiff able to prove ingredients of malicious prosecution - Whether plaintiff able to prove damages

TORT: *Malicious prosecution - Proof of damage - Defendant applied for bankruptcy proceeding against plaintiff - Adjudication Order and* E
Receiving Order ('AORO') against plaintiff; annulled - Plaintiff an advocate and solicitor - Plaintiff unable to obtain practising certificate - Plaintiff suffered loss of income - Plaintiff received financial support from wife - Plaintiff undertook development project - Plaintiff unable to proceed with said project - Whether plaintiff able to prove damages resulted from F
AORO

The plaintiff, an advocate and solicitor, was one of the directors of Spectre Consult Sdn Bhd ('Spectre Consult') and Proget Sdn Bhd. Both companies had banking facilities with the defendant, a licensed financial institution. The plaintiff was also the executive G
chairman of Azam Bakti Sdn Bhd ('Azam Bakti'), a joint venture company, set up by the plaintiff to undertake a development project in Tumpat, Kelantan ('Tumpat project'). The defendant obtained judgment against Spectre Consult for recovery of a term loan. The defendant then took out several execution proceedings H
against the plaintiff, a writ of seizure and sale being one of them. An Adjudication Order and Receiving Order ('AORO') was granted against the plaintiff *vide* a bankruptcy proceeding initiated by the defendant. The plaintiff's application for the annulment of the AORO was granted and the defendant's subsequent appeal to the I
High Court and the Court of Appeal were dismissed. The plaintiff

submitted that as a result of the AORO: (i) the plaintiff could not obtain his practising certificate and his legal firm suffered loss of income; (ii) the plaintiff's wife had to sell her land in order to support him; and (iii) the plaintiff was unable to proceed with the Tumpat project. The plaintiff brought this action for *inter alia*, malicious prosecution against the defendant and claimed for damages.

Held (dismissing the plaintiff's claim with costs):

(1) In order for the plaintiff to succeed in a claim for malicious prosecution, each ingredient had to be proven and not by inference of the others or any of them upon proof of one ingredient. *Chao Yan San v. Yuen Ten Soo;* refd. (para 17)

(2) The evidence showed that the defendant was negligent in maintaining the accounts of Spectre Consult. However, since there was no other evidence to indicate that the defendant was actuated by spite or ill will against the plaintiff, negligence in itself did not create liability on the part of the defendant. Furthermore, the writ of seizure and sale was not carried out and no proceeds were received from the same. This meant that the defendant honestly believed that the judgment debt remained unsatisfied and thus there was a reasonable and probable cause to issue the bankruptcy proceeding against the plaintiff. The plaintiff had therefore failed to prove the elements of malicious prosecution. (paras 18 & 19)

(3) The plaintiff had also failed to prove damages. The plaintiff could have obtained his practising certificate in 2002 after the AORO was annulled in 2001. Consequently, any loss of income from the legal firm could not be attributed to the AORO. There was also evidence that the practice was suffering from losses. It followed therefore, that the financial support given by the plaintiff's wife was not necessarily due to the AORO. The documentary evidence indicated that Azam Bakti was not able to secure the financing for the Tumpat project and this was the cause of its failure. It was not as a result of the AORO. (paras 20 & 22)

Case(s) referred to:

Chao Yan San v. Yuen Ten Soo [2000] 1 LNS 339 HC ***(refd)***

Ng Ah Ho v. Hong Leong Finance Bhd [1997] 3 CLJ 582 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 20 r. 9

For the plaintiff - Richard Kok Chi Wei (Mohd Ridza Ghazi & Mohamed Harmy Yusoff with him); M/s Harmy Yusoff & Co
For the defendant - Lua Ai Siew (Lim Jit Keong with him); M/s Soo Thien Ming & Nashrah

Reported by Melinda Robert

JUDGMENT

Tengku Maimun J:

[1] The plaintiff's claim against the defendant is for special, general and aggravated damages for malicious prosecution, selective prosecution and negligence which arose out of the bankruptcy proceedings taken out by the defendant against the plaintiff. The special damages comprise of loss of income, proceeds from the sale of his wife's land and loss of profit from a joint venture project.

The Facts

[2] The plaintiff was a former civil servant and an advocate and solicitor practising under the name and style of Messrs Yusof Abdullah & Co. He was admitted as an Advocate and Solicitor of the High Court of Malaya in 1969. The plaintiff, Tan Sri Dato Abu Zarim (TSAZ) and Datin Aishah @ Ashah bt Abdul Manan (Datin Aishah) were the directors of Spectre Consult Sdn Bhd (Spectre Consult) and Proget Sdn Bhd (Proget). Both Spectre Consult and Proget had banking facilities with the defendant. The plaintiff was also an Executive Chairman of Azam Bakti Sdn Bhd (Azam Bakti). Azam Bakti was a joint venture company set up by the plaintiff with one Mr Paolo Martignon to undertake a project in Tumpat, Kelantan for the development of a marina encompassing a housing project (the Tumpat project).

[3] *Vide* an order dated 1 October 1987 the defendant obtained an O. 14 judgment against Spectre Consult, the plaintiff, TSAZ and Datin Aishah (the judgment) for the recovery of a term loan of RM50,000 and an overdraft of RM30,000 granted by the defendant to Spectre Consult. The plaintiff, TSAZ and Datin Aishah were the guarantors for the said banking facilities. Although the order dated 1 October 1987 was against Spectre Consult, the

A plaintiff, TSAZ and Datin Aishah, the judgment filed by the defendant's solicitors stated that the judgment was only against Spectre Consult. The judgment was subsequently amended to include all the three guarantors.

B **[4]** Pursuant to the judgment, the defendant took out several execution proceedings against the plaintiff, namely a Writ of Seizure and Sale *vide* Kuala Lumpur A/E No. 37-114-1990 (the writ of seizure and sale); Bankruptcy Notice D2-29-3956-1990 (the 1990 bankruptcy proceeding); Bankruptcy Notice D2-29-887-
C 97 (the 1997 bankruptcy proceeding) and Bankruptcy Notice D3-29-2228-1998 (the 1998 bankruptcy proceeding). In his statement of claim, the plaintiff had only pleaded the 1997 and the 1998 bankruptcy proceedings. During the trial, the plaintiff applied to amend the statement of claim to include the other execution
D proceedings. I allowed the application. The court file however showed that the plaintiff had failed to file the amended statement of claim pursuant to O. 20 r. 9 of the Rules of the High Court 1980. In the circumstances the amendment that had been allowed will be ignored as it had ceased to have effect.

E **[5]** As at 19 February 1990 TSAZ made a payment of RM54,500 towards the account of Spectre Consult. TSAZ also paid RM150,000 in respect of both accounts of Spectre Consult and Proget in three instalments ie, on 31 March 1990; 30 April
F 1990 and 31 May 1990. Pursuant to those payments, the defendant *vide* a letter dated 12 June 1990 discharged TSAZ from all obligations to the defendant as a guarantor. As against Datin Aishah two (2) execution proceedings were taken out against her which were subsequently discontinued. Datin Aishah passed away in 2000.

G **[6]** *Vide* a letter dated 20 November 1991 the plaintiff wrote to the defendant enquiring about the payments made by TSAZ and the outstanding sum in respect of the judgment for purposes of a settlement proposal. The defendant responded *vide* a letter dated
H 4 December 1991 informing the plaintiff that the total amount paid towards Spectre Consult's account was RM38,500.

[7] On 27 March 2000 an Adjudication Order and Receiving Order (AORO) was granted against the plaintiff *vide* the 1998
I bankruptcy proceeding. On 25 October 2001 the AORO was stayed and on 5 March 2002 upon the application of the plaintiff

the AORO was annulled by the Senior Assistant Registrar. The defendant's appeal to the judge in chambers was dismissed on 18 March 2003. Zulkefli Ahmad Makinuddin J (as his Lordship then was) made the finding that as at 19 February 1990 the debt owing to the defendant was RM33,864.05 and that a writ of seizure and sale was executed on 8 March 1990. From the writ of seizure and sale the learned judge found that there was a sale proceeds of RM34,772.35. Taking that into account the learned judge further found that the debt of the plaintiff had been settled. The defendant's appeal to the Court of Appeal was dismissed on 22 September 2004. No further appeal to the Federal Court was filed by the defendant.

The Evidence

[8] In his testimony the plaintiff said that:

(i) the defendant had concealed the material facts on the payments made to the account of the judgment;

(ii) he could not obtain his practicing certificate due to the bankruptcy proceedings and he could not officially practise from 2002 until 2005 for approximately four years because of the AORO;

(iii) in those four years he has lost RM1,012,129.60 in income;

(iv) on 27.3.1997 Azam Bakti entered into an agreement with the State Government of Kelantan for the Tumpat project which was valued at RM300 million and that the bankruptcy proceedings had caused the failure of the Tumpat project;

(v) he owns 51% of the shares in Azam Bakti and his partner Paolo Mortignon who had initially shown great faith and confidence in the plaintiff lost this confidence when the bankruptcy notice was issued against the plaintiff, resulting in all efforts to obtain loan from overseas for the project halted;

(vi) Azam Bakti was wound up on 9 June 1998 on the petition of Prisma Harapan Sdn Bhd for its failure to pay a debt of RM1,599,908;

A (vii) prior to 1995 he was in reasonably good health and that he suffered stroke twice in 1995. The deterioration in his health was due to him being under tremendous stress when the defendant started legal proceedings against him.

B **[9]** PW2, the plaintiff's wife testified that she sold her land for RM950,000 in July 2002 to help the plaintiff as he was in financial difficulties due to the bankruptcy order and that the plaintiff's health has deteriorated since the bankruptcy proceedings by the defendant.

C **[10]** PW3 the accountant who prepared the Reports and Accounts of Messrs Yusof Abdullah & Partners (the firm) for the years 1996 (exh. P2), 1997, 1998 and 1999 (exhs. P3A, 3B, 3C) said that except for the year 1997, the firm was losing money; that the firm was not sound financially and depended on credit to
D survive; that he could not comment on the figure of RM253,030.40 stated by the plaintif as being the average income for the legal firm for the years 1996-1997 and that he does not know where the plaintiff got the figure from.

E **[11]** Dr Zainal Abidin bin Abdul Hamid (PW4) gave evidence that the plaintiff was admitted to Institut Jantung Negara in August 1995 and November 1995; that the plaintiff had suffered a stroke and was not a healthy man since 1995; that the contributory causes for stroke would be diabetes, hypertension and high
F cholesterol level. Dr Haizal bin Haron Kamar (PW5) gave evidence on his care for the plaintiff in 2006.

[12] The former Assistant General Manager of Bank Pertanian Malaysia (PW6) testified that Bank Pertanian did not give any
G funding to Azam Bakti for the project although *vide* a letter dated 17 October 1995, Bank Pertanian had confirmed that they were able and willing to support Azam Bakti in the project.

[13] For the defendant, DW1, the Vice President, Special Asset
H Management of the defendant gave the following evidence:

(i) that the defendant discharged the liability of TSAZ on 12 June 1990 after TSAZ made payments to the defendant in the sum of RM54,500;

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(ii) In respect of Datin Aishah a writ of seizure and sale was taken out *vide* A/E No. 37-113-1990 but the proceeding was discontinued because the attachment was unsuccessful as the premises were locked. The bankruptcy proceedings against Datin Aishah *vide* Shah Alam High Court No. 29-1537-98 was withdrawn on 14 June 2000 as Datin Aishah had passed away on 25 April 2000;

(iii) that as at 22 July 1998, the outstanding amount under the Spectre Consult Sdn Bhd was RM82,728.45 after deducting the payment of RM54,500 from Tan Sri Dato Abu Zarim;

(iv) that the bankruptcy proceedings were taken against the plaintiff based on an unsatisfied judgment dated 1 October 1987;

(v) that there was no *mala fide* on the part of the defendant against the plaintiff and neither has the defendant acted negligently or recklessly;

(vi) that as at 19 February 1990 TSAZ made a payment of RM150,000 towards both accounts of Spectre Consult Sdn Bhd and Proget Sdn Bhd;

(vii) that these sums were never reflected in the statement of Spectre Consult;

(viii) that the RM150,000 was paid into and reflected in the Proget account.

[14] DW2 and DW3 the Managers of Credit Administration at the Central Branch of the defendant, also maintained that the proceedings against the plaintiff were taken based on an unsatisfied judgment. Both denied practising selective prosecution and denied acting negligently or recklessly against the plaintiff. In respect of the payment of RM150,000 by TSAZ both DW2 and DW3 admitted that they were not the officers in charge of receiving the money and thus were not able to explain the same. The witnesses for the defendant agree that the defendant owes a duty to the plaintiff to make sure the accounts are managed properly and the figures are correct. The witnesses maintained that they have no intention to conceal and have no malice and further maintained that the bankruptcy proceedings were taken against the plaintiff because the plaintiff owed the defendant.

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The Submission

[15] Learned counsel for the defendant submitted *inter alia* that:

(a) negligence and selective prosecution cannot find an action in law and that the only recognized actions in law would be that of malicious prosecution and an abuse of the court process.

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(b) no particulars of malice and lack of reasonable and probable cause have been pleaded in the statement of claim.

C

(c) even assuming that there is no debt owing by the plaintiff to the defendant under the judgment (which was not admitted), the bankruptcy proceedings taken out against the plaintiff by itself would not amount to malice or lack of reasonable and probable cause.

D

(d) there is no evidence to show that the defendant was aware that no debt was owing under the judgment when the bankruptcy proceedings were taken out against the plaintiff or at the time when the AORO was entered against the plaintiff on 27 March 2000.

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(e) the AORO subsequently annulled is no evidence of want of reasonable and probable cause.

(f) the plaintiff has not proven his losses from his legal firm.

F

(g) the failure of the Tumpat Project has nothing to do with the bankruptcy proceedings or the AORO against the plaintiff.

(h) since the AORO was annulled on 5 March 2002 by which the bankruptcy was wiped out altogether, there is no basis for the claim for damages in respect of the plaintiff's health.

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[16] The submissions of learned counsel for the plaintiff are *inter alia* as follows:

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(i) that the plaintiff had fulfilled the 1st element for malicious prosecution as the 1998 bankruptcy was initiated by the defendant and dismissed by the High Court and the Court of Appeal on 18 March 2003 and 22 September 2004 respectively. There was no further appeal to the Federal court.

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(ii) that based on the learned judge's finding the defendant had no reasonable and probable cause to prosecute the plaintiff.

(iii) that the documentary evidence showed that the debt under the judgment had been fully repaid.

(iv) that had the RM150,000 or any part thereof been credited into or reflected in the Spectre Consult's account, the judgment would have been fully satisfied.

(v) that there was malice on the part of the defendant by deliberate and wilful concealment of the payments made in the amount of RM54,500 and RM150,500.

(vi) that being a former civil servant and a senior advocate and solicitor of the High Court of Malaya, it cannot be denied that there was injury to the plaintiff's reputation.

(vii) that the bankruptcy proceedings had serious repercussions on the plaintiff's health;

Learned counsel for the plaintiff in his written submission only dealt with malicious prosecution. I take it that the plaintiff has abandoned the issues of selective prosecution and negligence.

Findings

[17] The plaintiff has to prove that the defendant had no reasonable and probable cause to issue the bankruptcy proceedings; that the proceedings were malicious and that he has suffered damage. For the plaintiff to succeed, each ingredient of malicious prosecution has to be proved and not by inference of the others or any of them upon proof of one ingredient (see *Chao Yan San v. Yuen Ten Soo* [2000] 1 LNS 339).

[18] From the evidence, it has been proven that the accounts of Spectre Consult were not properly maintained by the defendant such that the payments made by TSAZ were not reflected in the Spectre Consult's account but in the Proget account. I am thus of the view that the defendant had been negligent in maintaining the said account. Apart from being negligent, there is no other evidence to show that the defendant was actuated by spite or ill-will against the plaintiff. Negligence *per se*, does not create liability on the part of the defendant. In *Ng Ah Ho v. Hong Leong Finance Bhd* [1997] 3 CLJ 582 RK Nathan JC (as he then was) said, which I respectfully adopt:

A In my view reasonable and probable cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. The defendant must actually and honestly believe in his cause. But this genuine belief must be entrenched on reasonable grounds. As to whether the grounds are reasonable is a matter of fact resting on the evidence adduced. But it is abundantly clear that no action will lie for commencement of legal proceedings, even in the absence of reasonable and probable cause unless such action is instituted maliciously. Both malice and the absence of reasonable and probable cause must co-exist if the plaintiff is to establish liability against the defendant. I totally accept the passage from *Salmond* and *Heuston (supra)* at p. 411 quoted by the defendant to the effect that so long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability.

[19] DW1 testified that the writ of seizure and sale was not in fact carried out and there were actually no proceeds received from the writ of seizure and sale. I am in no position to disturb the findings made by the learned judge as confirmed by the Court of Appeal in respect of the writ of seizure and sale. But what is significant from this testimony is that the defendant actually and honestly believed that the judgment debt remains unsatisfied and thus there was a reasonable and probable cause to issue bankruptcy proceedings against the plaintiff. In the circumstances the plaintiff has failed to prove the elements of malicious prosecution.

[20] The plaintiff has also failed to prove the damages. Given the fact that the AORO was stayed on 25 October 2001 and annulled on 5 March 2002, even if the plaintiff did not have the practicing certificate for the years 2002-2005, it could not be attributed to the AORO. As agreed by the plaintiff in cross-examination, he could have obtained the practicing certificate for the year 2002 when the AORO was stayed on 25 October 2001. Consequently, any loss of income from the legal firm for those years could not be the result of AORO. In any event, the evidence showed that the practice was suffering from losses. It follows therefore that the financial support given by the wife is not necessarily due to the AORO. The plaintiff's claim for the sale price of his wife's land cannot therefore be sustained.

[21] As for the Tumpat project, the plaintiff was in fact asked in re-examination as to the termination notice from the State Government of Kelantan and his answer was "because they have given me five years to complete project and its more than five years". When asked further he said "we got TOL – but we didn't get Federal Government approval." As to a further question why didn't he get further approval, the plaintiff said "Because Kelantan is PAS state."

[22] The documentary evidence showed that the failure of the Tumpat project was not due to the AORO but due to Azam Bakti not having the capital as the company was not able to secure the financing. That the inability to secure the financing has nothing to do with the AORO is clear from the letter written by Azam Bakti to Unit Perancang Ekonomi Kelantan dated 28 January 2000 (exh. D17) wherein the reason is stated thus "… malangnya pihak bank tersebut tidak dapat meluluskan pinjaman kami atas alasan bahawa syarikat kami belum lagi mempunyai hakmilik bagi tanah-tanah yang sedia ada di kawasan projek tersebut …" It is also to be noted that Azam Bakti was already wound up on 9 June 1998. Based on the above, the plaintiff's claim is dismissed with costs.